

The Public Lawyer



STATE BAR OF NEVADA

Nevada Supreme Court Cases

In re Parental Rights as to J.D.N., 125 Nev. Adv. Op. No. 44 (August 31, 2012) - The Court affirms a district court order terminating parental rights to minor children, ruling that 1) certain hearsay arguments were waived by failing to lodge specific objections at trial; 2) after it is determined that a presumption of parental-fault or child's-best-interest under NRS 128.109 applies, a parent can rebut that presumption by a preponderance of the evidence; and 3) substantial evidence supports the order terminating parental rights in this case.

Sierra Nevada Administrators v. Negriev, 125 Nev. Adv. Op. No. 45 (September 13, 2012) - The Court affirms a district court order denying a petition for judicial review in a workers' compensation action, ruling that NRS 616B.227 requires an average monthly wage calculation to include untaxed tip income when an injured employee

reported the tip income to his or her employer.

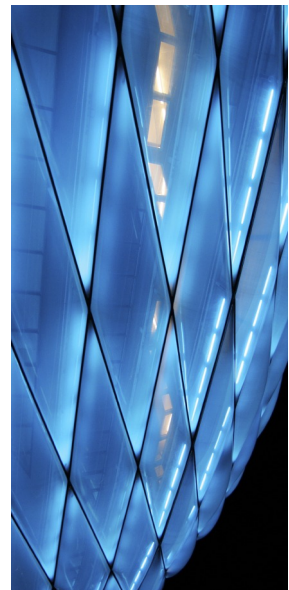
State of Nevada v. Reliant Energy, Inc., 125 Nev. Adv. Op. No. 46 (September 27, 2012) - The Court affirms a district court order dismissing appellants' complaint as preempted under federal law, in an action alleging that respondents conspired with now-defunct Enron to drive up the price of natural gas in Southern Nevada in violation of Nevada's antitrust laws.

Gold Ridge Partners v. Sierra Pac. Power, 125 Nev. Adv. Op. No. 47 (September 27, 2012) - The Court denies as moot a motion for remand in an appeal and cross-appeal from a district court judgment in an eminent domain action, ruling that a public agency may abandon an eminent domain action pursuant to NRS 37.180 after it has paid just compensation and the district court has issued a final order of condemnation, but before the resolution of

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Brett Kandt,
Chair



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issues pending on appeal, in which case the district retains jurisdiction to address a notice of abandonment and motion to dismiss even while the appeal is pending.

Edelstein v. Bank of New York Mellon, 125 Nev. Adv. Op. No. 48 (September 27, 2012) - The Court affirms a district court order denying a petition for judicial review under the foreclosure medication program (FMP), ruling that 1) to participate in the FMP and obtain an FMP certificate to proceed with the nonjudicial foreclosure of an owner-occupied residence, the party seeking to foreclosure must demonstrate that it is both the beneficiary of the deed of trust and the current holder of the promissory note; and 2) when MERS is the named beneficiary on the deed of trust and a different entity holds the promissory note, the note and the deed of trust are split, making nonjudicial foreclosure by either party improper.

Busefink v. State, 125 Nev. Adv. Op. No. 49 (October 4, 2012) - The Court affirms a judgment of conviction pursuant to an Alford plea of 2 counts of conspiracy to commit the crime of compensation for registration of voters, ruling that NRS 293.805's prohibition on providing compensation to voter registration canvassers based upon the number of voters that a canvasser registers neither violates the First Amendment nor is unconstitutionally vague.

State v. Javier C., 125 Nev. Adv. Op. No. 50 (October 4, 2012) - The Court affirms a district court order dismissing a charge of battery committed by a prisoner under NRS 200.481(2)(f), ruling that the statute applies to criminal custodial confinements

and a juvenile detained for delinquency in a state facility is not a "prisoner" (as defined in NRS 193.022) for purposes of the statute.

Sheriff v. Andrews, 125 Nev. Adv. Op. No. 51 (October 4, 2012) - The Court affirms a district court order granting a pre-trial petition for writ of habeas corpus and dismissing a charge of possession of an item commonly used to escape, declining to address the constitutionality of NRS 212.093(1) and instead ruling that the statute, which makes it unlawful to possess such items, applies to items used forcibly break out of or physically flee from a jail cell, and does not prohibit the possession of cell phones.

Goudge v. State, 125 Nev. Adv. Op. No. 52 (October 25, 2012) - The Court reverses a district court order denying a post-conviction petition for release from lifetime supervision, ruling that under the statutory provision governing such petitions (NRS 276.0931(3)), the district court has discretion to determine whether a petitioner has met the statutory requirements, but lacks discretion to deny a petition if the courts determines the statutory requirements are met. In this instance, the court denied the petition based upon victim impact testimony and made no findings as to whether the appellant had met the statutory requirements.

In re Fontainebleau Las Vegas Holdings, 125 Nev. Adv. Op. No. 53 (October 25, 2012) - The Court answers in part questions certified pursuant to NRAP 5 regarding equitable subrogation and contractual subordination in a mechanics'

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lien context, ruling that 1) under the express language of NRS 108.225 equitable subrogation does not apply against mechanics' lien claimants; and 2) pursuant to NRS 108.2453 and 108.2457, subordination agreements purporting to subordinate mechanics' liens prospectively are not enforceable; however, mechanics' lien claimants may waive their statutory protections under NRS 108.2457.

Hernandez v. Bennett-Haron, 125 Nev. Adv. Op. No. 54 (October 25, 2012) - The Court reverses a district court order in consolidated cases granting in part and denying in part declaratory relief and denying an injunction challenging the constitutionality of the Clark County ordinance code provisions establishing coroner's inquests into officer-involved deaths, ruling that, while appellants' due process arguments fail, the code provision requiring a justice of the peace to preside over coroner's inquest proceedings regarding officer-involved deaths intrudes on the Legislature's authority, and because the offending provision cannot be severed, the entire inquest scheme for officer-involved deaths must be struck down.

Jackson v. State, 125 Nev. Adv. Op. No. 55 (December 6, 2012) - On consolidated appeals from district court judgments of conviction based on similar questions regarding double jeopardy and redundancy, the Court affirms, rejecting the appellants' arguments that their multiple convictions violate Nevada's unique redundancy doctrine, even if they do not offend double jeopardy, reaffirming that multiple convictions factually based on the same act or

course of conduct can stand if each crime contains an element the other does not (*Barton v. State*, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001), citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932), wherein the Court rejected the fact-driven "same conduct" approach in favor of *Blockburger's* "same elements" approach).

Holcomb v. Georgia Pacific, 125 Nev. Adv. Op. No. 56 (December 6, 2012) - The Court affirms in part and reverses in part a district court summary judgment in a torts action, adopting the test set forth in *Lohrmann v. Pittsburgh Corning Corp.*, 782 F.2d 1156 (4th Cir. 1986), for use in cases where a plaintiff's mesothelioma is alleged to have been caused by exposure to products containing asbestos, and, based on the adoption and application of that test, ruling that appellants raised inferences of probable exposure to Kelly-Moore, Kaiser Gypsum, and Georgia Pacific's products sufficient to defeat summary judgment as to those respondents, but not as to Union Carbide.

Aspen Financial Services v. Dist. Ct., 125 Nev. Adv. Op. No. 57 (December 6, 2012) - The Court denies a writ petition challenging a district court order denying petitioners' motion to stay certain testimonial discovery, ruling that 1) although parties facing a civil proceeding and a simultaneous criminal investigation often confront unpleasant choices with regard to testifying, and although the district court has the power to stay the civil proceeding in the interest of fairness, it is constitutionally permissible for both matters to proceed concurrently; 2) the district court's deter-

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mination regarding whether a stay is warranted is a discretionary decision that comes at the end of a careful balancing of the interests involved; and 3) in this instance, the district court did not abuse its discretion in denying petitioners' motion to stay.

Clark County v. S. Nevada Health Dist., 125 Nev. Adv. Op. No. 58 (December 6, 2012) - The Court affirms in part and reverses in part a district court order granting writs of mandamus and prohibition in a local government action, ruling that, while NRS 439.365 is ambiguous, the legislative history demonstrates that NRS 439.365 was designed to provide health districts with a dedicated funding source that would not be subject to the unabated discretion of the county, and the statute must be interpreted as requiring a county to adopt a health district's budget as submitted and without modification, so long as the requested amount does not exceed the statutory maximum set forth in NRS 439.365(2).

United Rentals Hwy. Techs. v. Wells Cargo, 125 Nev. Adv. Op. No. 59 (December 6, 2012) – On consolidated appeals from district court orders and a judgment in a negligence and indemnity action, the Court reverses, in a case involving consideration of what effect specific contract language has on an indemnitor's duty to indemnify and defend an indemnitee in a personal injury action, where that language provides that indemnification will occur "to the extent" that any injury or damage is "caused" by the indemnitor. Appellant United Rentals Highway Technologies, Inc., contracted to provide traffic con-

trol on a road improvement project coordinated by respondent Wells Cargo, Inc. The parties' contract required United Rentals to indemnify, defend, and hold harmless Wells Cargo to the extent that United Rentals caused any injury or damage. A woman was injured in connection with the project and sued both parties for negligence; Wells Cargo sought indemnification and defense from United Rentals. Ruling that a plain reading of the contractual indemnity language imposes a causal limitation on United Rentals' duty to indemnify and defend Wells Cargo, and because the jury found that United Rentals did not proximately cause the underlying accident, United Rentals did not have a duty to indemnify or defend Wells Cargo.

Grisham v. Grisham, 125 Nev. Adv. Op. No. 60 (December 6, 2012) – On consolidated appeals from a district court divorce decree and a judgment adjudicating an attorney's lien, the Court affirms, finding that the district court incorporated into its decree a written but unsigned property settlement agreement based on the parties' testimony in open court that they stipulated to its terms, and admitted the draft as a hearing exhibit and approved the oral stipulation by minute order. This procedure complied with applicable district court rules, which obviates any issue as to the statute of frauds, and the draft otherwise met the requirements for an enforceable contract.

Einhorn v. BAC Homes Loans Servicing, 125 Nev. Adv. Op. No. 61 (December 6, 2012) – The Court affirms a district court order denying sanctions for alleged

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violations of the foreclosure mediation statute and rules, ruling that district court's findings that BAC provided all documents needed to determine BAC's entitlement to enforce the note and to foreclose and that BAC participated in good faith had substantial evidentiary support.

Nevada v. Tricas, 125 Nev. Adv. Op. No. 62 (December 13, 2012) - The Court affirms a district court order granting respondent's motion to withdraw her guilty plea and dismiss the case, ruling that 1) Nevada's prosecutorial immunity statutes, NRS 178.572 and NRS 178.574, confer transactional immunity, and 2) when this immunity is granted to a defendant who has already pleaded guilty to, but has not yet been sentenced for, offenses implicated by the compelled testimony, the immunity bars the defendant's punishment in the pending criminal prosecution.

DeVries v. Gallio, 125 Nev. Adv. Op. No. 63 (December 13, 2012) - The Court affirms in part and reverses in part a district court divorce decree, ruling that while the district court's separate property decisions are supported by substantial evidence, the court failed to conduct an evidentiary hearing on the spousal support issue or expressly analyze the factors for determining spousal support set forth in Sprenger v. Sprenger, 110 Nev. 855, 878 P.2d 284 (1994), and NRS 125.150(8), before declining to award spousal support to either party.

Casey v. Wells Fargo Bank, N.A., 125 Nev. Adv. Op. No. 64 (December 13, 2012) - The Court reverses a district court order

confirming an arbitration award and entering judgment under the Uniform Arbitration Act of 2000, codified in NRS 38.206 to 38.248, ruling that the district court summarily granted the motion of respondent Wells Fargo Bank, N.A., to confirm its arbitration award against appellant Inger Casey, without giving Casey the opportunity to be heard in opposition to the motion to confirm, even though the 90-day period for Casey to move to vacate, modify, or correct the award had yet to run. agreement, and it otherwise comports with contract law principles, the agreement is enforceable under District Court Rule 16. The Joneses had sought sanctions against SunTrust on the basis that SunTrust violated NRS 107.086 and the Foreclosure Mediation Rules (FMRs) by failing not providing copies of any assignments at the foreclosure mediation. The Court found that 1) substantial evidence supported the district court's finding that the mediator's statement containing the written short-sale terms, signed by all parties, constitutes an enforceable settlement agreement; 2) the short-sale agreement was supported by consideration, since SunTrust agreed to suspend the foreclosure proceedings against the Joneses for two months in exchange for the Joneses' agreement to a short sale; and 3) the parties expressly agreed to foreclosure in the event that the short sale did not take place.

Butwinick v. Hepner, 125 Nev. Adv. Op. No. 65 (December 27, 2012) - The Court denies a motion to substitute in as real parties in interest and to dismiss proper person appeal from a district court judgment in a contract and tort action, ruling that,

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although Nevada's judgment execution statutes permit a judgment creditor to execute on a debtor's personal property, including the right to bring an action to recover a debt, money, or thing, a "thing in action" subject to execution under NRS 21.080 and NRS 10.045 does not include a party's defenses to an action, and permitting a judgment creditor to execute on a judgment in such a way would cut off a debtor's defensive appellate rights in a manner inconsistent with due process principles.

Beazer Homes Holding Corp. v. Dist. Ct., 125 Nev. Adv. Op. No. 66 (December 27, 2012) - The Court grants in part a writ petition challenging a district court order determining that, under NRS 116.3102(1) (d), a homeowners' association could litigate, on behalf of its members, construction-defect without meeting NRCP 23's class action prerequisites, ruling that while purely representative actions brought by homeowners' associations are not necessarily precluded by failure to meet NRCP 23's class action prerequisites, the district court is required, if requested by the parties, to thoroughly analyze and document its findings to support alternatives to class action for the case to proceed [petition granted in part to permit the district court to conduct the appropriate analysis].

Howard v. State, 128 Nev. Adv. Op. 67 (December 27, 2012) – In a capital post-conviction appeal related to sealing documents, the Court grants the State's motion for reconsideration of order sealing documents and denies the appellant's competing motions, addressing the procedures and

requirements for sealing documents and records in criminal cases pending in the Nevada Supreme Court and ruling that 1) filed documents are presumptively open to the public unless the Court grants a motion to file specific documents under seal based on a showing that such action is required by law or an identified significant competing interest; 2) a party who seeks to have documents filed under seal must file a motion that identifies the information that the party seeks to have sealed, sets forth the reasons that such action is necessary, and specifies the duration of the sealing order; and 3) in this instance, the documents that appellant's counsel sought to have sealed do not meet the requirements for sealing since the manner in which appellant attempted to seal the documents initially was improper and the information he sought to protect from public disclosure is not of the character appropriate for sealing.

Brass v. State, 128 Nev. Adv. Op. 68 (December 27, 2012) – The Court reverses a jury conviction of burglary, grand larceny, conspiracy to commit kidnapping, first degree kidnapping, conspiracy to commit murder, and first-degree murder with the use of a deadly weapon, ruling that the district court committed reversible error by dismissing a prospective juror before conducting a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986); when a defendant asserts a *Batson* violation, it is a structural error to dismiss the challenged juror prior to conducting the *Batson* hearing because it shows that the district court predetermined the challenge before actually hearing it.

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Dynamic Transit v. Trans Pac. Ventures, 128 Nev. Adv. Op. 69 (December 27, 2012) – On an appeal and cross-appeal from a district court amended judgment, certified as final pursuant to NRCP 54(b), in a contract and torts action, the Court affirms the district court's judgment in respondents' favor, ruling that a shipper's state-law claim for conversion is not preempted by the Carmack Amendment's federal liability limitation for interstate carriers, where the carrier was not authorized to take possession of the shipper's property but did so for its own gain, since the Carmack Amendment does not apply in cases of true conversion and sufficient evidence supports the district court's findings and award of damages.

In re A.B., 128 Nev. Adv. Op. 70 (December 27, 2012) – The Court denies a writ petition challenging a district court order that rejected a dependency master's findings of fact, recommendation, and order of approval in an NRS Chapter 432B proceeding and dismissed the abuse and neglect petition, ruling that the record supports the juvenile court's decision and there was no abuse of discretion in sustaining the objection to the dependency master's findings and dismissing the NRS Chapter 432B petition.

Foster v. Costco Wholesale Corporation, 128 Nev. Adv. Op. 71 (December 27, 2012) – The Court reverses a district court summary judgment in favor of respondent Costco against appellant in a tort action arising from appellant's injuries from falling over a wooden pallet positioned in an aisle of a Costco warehouse by an employ-

ee. The district court ruled that Costco had not breached its duty of care because the hazard created by the pallet was open and obvious to appellant. Adopting the rule set forth in the Restatement (Third) of Torts: Physical and Emotional Harm section 51, the Court holds that 1) a landowner owes a duty of reasonable care to entrants for risks that exist on the landowner's property; 2) the open and obvious nature of a dangerous condition does not automatically relieve a landowner from the general duty of reasonable care; 3) and the fact that a dangerous condition may be open and obvious bears on the assessment of whether reasonable care was exercised by the landowner and whether reasonable self-protection was exercised by the injured party [remanded to the district court to conduct the appropriate analysis].

Woods v. State, 129 Nev. Adv. Op. No. 1 (January 17, 2013) – The Court reverses a conviction pursuant to a bench trial of sex offender failure to notify appropriate agencies of change of address, ruling that the State's failure to file a responsive pleading in justice court, leading to dismissal of a criminal complaint, constituted conscious indifference to a defendant's procedural rights and/or important procedural rules barring a new prosecution for the same offense. The Court held that 1) conscious indifference analysis applies where the State's failure to oppose a defendant's motion to dismiss results in the dismissal of a criminal complaint; 2) the State's failure to file an opposition demonstrated conscious indifference to an important procedural rule, in this instance JCRRT 11(c); and 3) the district court erred by denying appel-

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lant's pretrial petition for a writ of habeas corpus.

Las Vegas v. Cliff Shadows Profl Plaza, 129 Nev. Adv. Op. No. 2 (January 31, 2013) – In an appeal and cross-appeal from district court orders in an eminent domain action involving property originally acquired by Cliff Shadows' predecessor-in-interest through a federal land patent that was issued pursuant to the Small Tract Act of 1938, the Court reverses in part, vacates in part, and remands, ruling that 1) the district court erred in determining that the federal land patent did not create a 33-foot-wide easement because the plain meaning of the patent's language creates a valid public easement; 2) the district court erred in determining that the City's proposed use of the easement constitutes a taking because the use of this easement is within its scope and does not strip Cliff Shadows of a property interest; and 3) consequently, Cliff Shadows was not entitled to just compensation or attorney fees.

Garcia v. Prudential Ins. Co. of America, 129 Nev. Adv. Op. No. 3 (January 31, 2013) – The Court affirms a district court order dismissing a contract and tort action, clarifying that *Bower v. Harrah's Laughlin*, 125 Nev. 470, 482, 215 P.3d 709, 718 (2009), which broadly required Nevada courts to apply federal law in determining whether a prior federal court determination should be given preclusive effect, applies only to federal question cases, and holding that when the federal court decides a case under its diversity jurisdiction, *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001), governs

the treatment of claim and issue preclusion. The Court further rules that 1) New Jersey preclusion law applies under *Semtek*; 2) under New Jersey law, appellant would be precluded from relitigating her claims; 3) she is therefore precluded from litigating her claims in Nevada, and 4) although the district court erred by applying federal law instead of state law on this issue, it reached the correct result.

Attorney General v. Gypsum Resources, 129 Nev. Adv. Op. No. 4 (January 31, 2013) – The Court answers four certified questions pursuant to NRAP 5 from the United States Court of Appeals for the Ninth Circuit regarding the constitutionality of Senate Bill 358, 72d Leg. (Nev. 2003), in which the Nevada Legislature adopted amendments to Nevada law that prohibit Clark County from rezoning land in certain areas adjacent to Red Rock Canyon National Conservation Area, including land owned by respondent. The Court answers that 1) S.B. 358 violates Nev. Const. Art. 4, § 20 because it is a local law that regulates county business; 2) S.B. 358 violates Nev. Const. Art. 4, § 21 because a general law could have been made applicable; 3) S.B. 358 violates Nev. Const. Art. 4, § 25 because it establishes a system of county government that is not uniform throughout the State; and 4) there is no applicable emergency or natural resource justification that renders S.B. 358 valid despite otherwise violating the Nevada Constitution

Education Init. v. Comm. to Protect Nev. Jobs, 129 Nev. Adv. Op. No. 5 (January 31, 2013) – The Court reverses a

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district court's grant of declaratory and injunctive relief invalidating appellant's Education Initiative and enjoining the Secretary of State from presenting the Education Initiative to the 2013 Legislature and from placing it on the 2014 general election ballot, ruling that 1) in reviewing an initiative's description of effect in conformance with NRS 295.009(1)(b), the district court should assess whether the description contains a straightforward, succinct, and nonargumentative statement of what the initiative will accomplish and how it will achieve those goals; 2) the description of effect in the Education Initiative satisfies this requirement; and 3) the Education Initiative complies with NRS 295.009(1)(a)'s single-subject requirement in that its parts are functionally related and germane to each other and to the Initiative's purpose to fund education.

Building Energetix Corp. v. EHE, LP, 129 Nev. Adv. Op. No. 6 (February 14, 2013) – The Court affirms a district court order granting a deficiency judgment under NRS 40.455 after foreclosure, ruling that 1) a valid nonjudicial foreclosure sale may occur under NRS Chapter 107 after a delinquent-tax certificate has issued to the county treasurer under NRS Chapter 361; 2) consistent with NRS 107.080(5), a trust-deed beneficiary who acquires such property on credit bid at the foreclosure sale can later redeem, or obtain reconveyance of, the property from the county treasurer; and 3) since the foreclosure sale was proper, the deficiency judgment was as well.

Abdullah v. State, 129 Nev. Adv. Op. No. 7 (February 14, 2013) – The Court dis-

misses an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus, ruling that the district court clerk lacks authority to prepare and file a notice of appeal on an appellant's behalf unless authorized by statute or court rule, and direct the district court clerk to file a notice of appeal from the judgment of conviction consistent with the district court's order and NRAP 4(c).

Blackburn v. State, 129 Nev. Adv. Op. No. 8 (February 14, 2013) – The Court affirms a conviction, pursuant to an *Alford* plea, of attempted sexual assault, ruling, with regard to psychosexual evaluations, that 1) a risk assessment based on clinical judgment, in addition to psychological tests, comports with Nevada law because NRS 176A.110 and NRS 176.139 call for the use of clinical judgment in tandem with diagnostic tools; and 2) the evidence in the record supports the district court's decision to deny appellant's request for a new psychosexual evaluation and to reinstate the judgment of conviction.

Sowers v. Forest Hills Subdivision, 129 Nev. Adv. Op. No. 9 (February 14, 2013) – The Court affirms a district court order granting a permanent injunction against construction of a proposed residential wind turbine, ruling that substantial evidence exists to support the district court's conclusion that the proposed wind turbine 1) constitutes a nuisance; and 2) would create a nuisance in fact, when the aesthetics are combined with other factors, such as noise, shadow flicker, and diminution in property value.

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Morrow v. Dist. Ct., 129 Nev. Adv. Op. No. 10 (February 14, 2013) – The Court grants a writ petition challenging a district court order that rejected, as untimely, a peremptory challenge for a change of judge under SCR 48.1, ruling that 1) the time to file a peremptory challenge begins to run upon proper notice of a hearing and may expire regardless of whether a party has appeared in the action; and 2) because SCR 48.1(3)(a)'s ten-day window excludes intermediate nonjudicial days, the instant peremptory challenge was timely filed.

Davis v. Dist. Ct., 129 Nev. Adv. Op. No. 11 (February 14, 2013) – The Court denies a writ petition challenging a district court order denying a motion to dismiss an indictment, ruling that facsimile service of a notice of intent to seek an indictment constitutes adequate service under NRS 172.241(2), as NRS 172.241(2) does not require personal service and NRS 178.589(1) permits facsimile transmission of motions, notices, and other legal documents where personal service is not required.

Peck v. Crouser, 129 Nev. Adv. Op. No. 12 (February 28, 2013) – The Court dismisses a pro per appeal from a district court order dismissing a complaint and from a post-judgment district court order declaring appellant a vexatious litigant, ruling that 1) since vexatious litigant orders are not independently appealable under NRAP 3A(b) or any statutory provision, the Court lacks jurisdiction to review an appeal from such an order; 2) post-judgment vexatious litigant orders may only be challenged by filing a writ petition pursuant to NRS Chapter 34; and 3) writ relief is the appropriate

vehicle to review vexatious litigant orders because review of such orders will involve whether the district court manifestly abused its discretion or acted in the absence of jurisdiction.

In Re Parental Rights as to A.G., 129 Nev. Adv. Op. No. 13 (February 28, 2013) – The Court affirms a district court order denying a petition to terminate parental rights as to a minor child, ruling that when a child is placed into state custody based on the neglectful actions of one parent, keeping the child from the custody of the other parent, when that parent has not been found to have neglected the child, violates the nonoffending parent's fundamental constitutional rights to parent his or her child, and the nonoffending parent cannot be required to comply with a case plan and accept services under NRS 432B.560 for purposes of reunification.



Ninth Circuit Court of Appeals Cases

Emeldi v. University of Oregon, __ F.3d __, No. 10-35551 (9th Cir. 2012) – The Court denies a panel rehearing and rehearing en banc in a Title IX case, and Judge Kosinski in a dissent details why the majority opinion, by permitting the plaintiff to create a material issue of fact by speculation, undermines the pleading framework for Title IX and Title VII and erodes well-established standards for summary judgment.

Babb v. Lozowsky, __ F.3d __, No. 11-16784 (9th Cir. 2013) – A panel reversed the district court’s grant of a 28 U.S.C. § 2254 habeas corpus petition challenging a murder and robbery conviction, due to an unconstitutional jury instruction given pursuant to *Kazalyn v. State*, 825 P.2d 578 (1992). While petitioner Babb’s direct appeal was pending, the Nevada Supreme Court invalidated the *Kazalyn* instruction in *Byford v. State*, 994 P.2d 700 (2000), which held that the *Kazalyn* instruction blurred the three elements of first degree murder – willfulness, deliberation and premeditation – and relieved the state of its burden of proving each element of the crime. Although Ninth Circuit granted habeas relief in *Polk v. Sandoval*, 503 F.3d 903 (9th Cir. 2007), based on a *Kazalyn* instruction, the Nevada Supreme Court subsequently clarified in *Nika v. State*, 198 P.3d 839 (2008), that *Byford* announced a new interpretation of the state murder statute that changed the law, as opposed to clarifying it. The district court determined that it was bound by *Polk* and granted habeas relief to Babb. The panel first held that the Nevada state court unreasonably applied established federal law

expressed in *Bunkley v. Florida*, 538 U.S. 835 (2003), and violated Babb’s due process rights by not applying *Byford*. The panel explained that *Polk* did not control the outcome of this case because *Nika* undermined this Court’s holding in *Polk* as to the constitutionality of the *Kazalyn* instruction. The panel further explained that *Byford* applied to Babb’s case because newly declared constitutional rules must be applied to convictions that were not yet final at the time the change occurs. The panel next held that the error was harmless because the panel was reasonably certain that no juror convicted Babb based on the theory of premeditation, given overwhelming evidence supporting the felony murder theory and the prosecutor’s focus on that theory during closing argument.



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Lefemine v. Wideman, 568 U.S. __, No. 12-168 (November 5, 2012) – Through a unanimous *per curiam* opinion, the Court summarily reversed a Fourth Circuit decision that had denied attorney’s fees under 42 U.S.C. §1988 to a plaintiff who had secured a permanent injunction. The district court permanently enjoined the defendant officials from preventing plaintiff from carrying pictures of aborted fetuses during demonstrations. The Court held that, “[b]ecause the injunction ordered the defendant officials to change their behavior in a way that directly benefited the plaintiff,” he was a “prevailing party” entitled to receive fees.

Arkansas Game & Fish Comm’n v. United States, 568 U.S. __, No. 11-597 (December 4, 2012) – By an 8-0 vote, the Court held that government-induced flooding need not be permanent to take property within the meaning of the Takings Clause, reversing a Federal Circuit decision that had held that temporary flooding is automatically exempt from Takings Clause inspection. The Court added that whether the six years of flooding by the Army Corps of Engineers, which destroyed much of petitioner’s bottomland hardwood timber, constitutes a taking will depend on the “particular circumstances,” including “the degree to which the invasion is intended or is the foreseeable result of authorized government action,” “the character of the land and the owner’s ‘reasonable investment-backed expectations’ regarding the land’s use,” and the “[s]everity of the interference.”

Ryan v. Valencia Gonzales, 568 U.S. __, No. 10-930 (January 8, 2013) – The Court unanimously held that neither 18 U.S.C. §3599 nor 18 U.S.C. §4241 entitles a state prisoner to a stay of his federal habeas proceeding when he is found incompetent to assist habeas counsel. The Court ruled that the Ninth and Sixth Circuits erred in inferring that those statutes created a right to competence during federal habeas proceedings. The Court further held a district court properly exercises its equitable discretion when it denies a stay based on alleged incompetence when the federal habeas claims are record-based; and that any equity-based stay granted so that a petitioner may regain competence may not be indefinite. “Where there is no reasonable hope of competence, a stay is inappropriate and merely frustrates the State’s attempts to defend its presumptively valid judgment.”

Los Angeles City Flood Control District v. Natural Resources Defense Council, Inc., 568 U.S. __, No. 11-460 (January 8, 2013) – The Court unanimously held that the Ninth Circuit erred when it ruled that the flow of water out of a concrete channel within a river was a “discharge of a pollutant” under the Clean Water Act, finding the Ninth Circuit’s ruling directly conflicted with *South Florida Water Management District v. Miccosukee Tribe of Indians*, 541 U.S. 95 (2004).

Florida v. Harris, 568 U.S. __, No. 11-817 (February 19, 2013) – The Court unanimously held that the Florida Supreme Court erred when it “created a strict evidentiary checklist” a state must satisfy to

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establish that an alert by a drug-detection dog provided probable cause to search a car. The Court concluded that “[i]f a bona fide organization has certified a dog after testing his reliability in a controlled setting” (or “if the dog has recently and successfully completed a training program”), “a court can presume (subject to any conflicting evidence offered) that the dog’s alert provides probable cause to search.” The Court noted that a defendant may cross-examine the testifying officer and introduce his own witnesses on the issue.

FTC v. Phoebe Putney Health Systems, Inc., 568 U.S. __, No. 11-1160 (February 19, 2013) – The state-action doctrine immunizes from federal antitrust scrutiny actions taken by a local governmental entity “pursuant to a clearly articulated and affirmatively expressed state policy to displace competition.” The Court unanimously held that the doctrine does not apply to the actions of a local hospital authority that entered a transaction that created a local monopoly pursuant to a Georgia law that gives local hospital authorities “general corporate powers, including the power to acquire hospitals.” The Court concluded that the Georgia law fails the clear-articulation test “because there is no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership.” In particular, “while the Law does allow the Authority to acquire hospitals, it does not clearly articulate and affirmatively express a state policy empowering the Authority to make acquisitions of existing

hospitals that will substantially lessen competition.”

Bailey v. United States, 568 U.S. __, No. 11-770 (February 19, 2013) – In *Michigan v. Summers*, 452 U.S. 692 (1981), the Court held that police officers executing a search warrant may detain the occupants of the premises. The Court here held, by a 6-3 vote, that *Summers* does not justify the detention of a person who has left “the immediate vicinity of the premises being searched.” The Court reasoned that none of the three law enforcement interests that justified *Summers* – preventing occupants from endangering the officers conducting the search, preventing occupants from interfering with orderly completion of the search, and preventing flight – applies “with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises.”

Chaidez v. United States, 568 U.S. __, No. 11-820 (February 20, 2013) – In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Court held that criminal defendants receive ineffective assistance of counsel under the Sixth Amendment when their counsel fail to advise them that pleading guilty to an offense will subject them to deportation. By a 7-2 vote, the Court held that under the principles of *Teague v. Lane*, 489 U.S. 288 (1989), *Padilla* announced a new rule and therefore does not apply retroactively to cases already final on direct appeal.

Evans v. Michigan, 568 U.S. __, No. 11-1327 (February 20, 2013) – By an 8-1 vote, the Court held that the Double Jeopardy

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Clause bars retrial after the trial judge erroneously held a particular fact to be an element of the offense and then granted a midtrial directed verdict of acquittal because the prosecution failed to prove that fact. The Court explained that it had “previously held that a judicial acquittal premised upon a ‘misconstruction’ of a criminal statute is an ‘acquittal on the merits . . . [that] bars retrial,’” and found “no meaningful distinction between a trial court’s ‘misconstruction’ of a statute and its erroneous addition of a statutory element.”

Clapper v. Amnesty Int’l USA, 568 U.S. ___, No. 11-1025 (February 26, 2013) – In an opinion analyzing the Article III constitutional limitation of federal-court jurisdiction to actual cases or controversies, the Court by a 5-4 vote held that a group of U.S. citizens challenging the constitutionality of the FISA Amendments Act of 2008 (FAA) do not have Article III standing. The FAA allows the government to engage in electronic surveillance of communications of non-U.S. persons located abroad without specifying the individuals or facilities to be monitored. The plaintiffs argued that their work “requires them to engage in sensitive international communications with individuals who they believe are likely targets of surveillance under” the law. The Court held that 1) their claim of actual injury is too speculative, for they have no knowledge that the government is targeting calls to which they are parties; and 2) nor can they show that any injury in fact is fairly traceable to the FAA, for their calls might be targeted under some legal authority other than the FAA.

2013 NEVADA GOVERNMENT CIVIL ATTORNEYS CONFERENCE

Harveys Resort – South Lake Tahoe, NV
May 1-3, 2013

The Nevada Advisory Council for Prosecuting Attorneys and the State Bar of Nevada Public Lawyers Section will co-sponsor the 2013 Nevada Government Civil Attorneys Conference, scheduled for May 1-3 at Harveys Resort at South Lake Tahoe, NV. This conference is an annual forum for networking and education on the critical issues facing government counsel representing state, municipal, county or other public entities. The conference will feature 10 hours of CLE presentations (including ethics), and the Public Lawyers Section annual meeting on May 2nd.

Attendees may register directly through the Nevada Advisory Council for Prosecuting Attorneys at www.nvpac.nv.gov. REGISTRATION DEADLINE IS APRIL 12, 2013.

Attendees are responsible for making their lodging reservations; contact Harveys Resort at 1-800-455-4770 prior to April 1st and use group code S05ATT3 for the conference room rate of \$59/night plus tax, or book online at:

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